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BRIEF OF DEFENDANTS IN ERROR.

IN SUPREME COURT,

OF UNITED STATES.

October Term, A. D. 1900.

231

Filed Mar. 15, 1901.

THE RED RIVER VALLEY NATIONAL BANK OF FARGO,

Plaintiff in Error,

vs.

ARCHIBALD J. CRAIG, MENOMONIE HYDRAULIC PRESS BRICK CO.; F. X. GOULET; HORACE HANCE AND EDWARD B. HANCE, LATE PARTNERS AS HANCE BROTHERS; FARGO GAS & ELECTRIC CO., HENRY E. MAGILL; S. F. REMER, AS REMER ROOFING CO.; MATT NUREMBERG, FRANK PORWELL, AND A. GRUBER, AS GRUBER & CO.

Defendants in Error.

SAMUEL B. PINNEY,
Attorneys for Defendants in error.
Fargo, N. D.

Geo. W. Newton, Emerson H. Smith,
John D. Benton, V. R. Lovell and
C. L. Bradley,
of Counsel, Fargo, N. D.

Forte & Company, Printers, Fargo.

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BRIEF OF DEFENDANTS IN ERROR.

I.

STATEMENT OF FACTS.

To correct the statements following the beginning of the last paragraph on page 6 of brief of Plaintiff in Error,

we state further facts, as follows: The action was commenced in November, 1898, (not 1899). See record, p. 12, folio 17, where the endorsement of the sheriff appears, "Received for service, Nov. 16th, 1898". And it was actually tried in the district court before November, 1899. The summons, as printed in the record, has an erroneous date.

All the parties having unsatisfied mechanics liens upon the lot and building joined as plaintiffs, under the provisions of the Code of Dakota Territory and of the Code of North Dakota. Session Laws, 1883, Dak. Ty., Ch. 83, p. 198; Comp. Laws, 1887, Sec. 5481; Rev. Codes, N. D., 1895, Sec. 4796.

The Plaintiff in error, one of the defendants in the state court, appeared in said action and filed its answer to the complaint of the plaintiffs. (Tr. of Record, p. 13-14.) All the other defendants defaulted. (Tr. of Record, p. 15, f. 22 and p. 16.) The plaintiffs in their complaint allege facts showing that the building in question cannot be removed unless first torn down and destroyed, and allege that it would be for the best interest of all parties to have the lot and building sold together, etc. (Tr. of Record, p. 10, par. 21.) The Plaintiff in error in its answer alleges like facts. (Tr. of Record, p. 14, folio 20 and p. 15.)

The action was tried to the court without a jury, upon certain stipulated facts, (not shown in the record), and certain oral and documentary evidence (not shown in

the record), and thereupon the court made and filed its Findings of Fact (Tr. of Record, pp. 20-28) and Conclusions of Law (Tr. of Record pp. 28-31), and thereby sustained tne contention of the plaintiffs and established their several liens in the order in which they were filed. (Sec. 664, Code of Civil Pro. of Dak. Ty., 1877; Comp. Laws Dak. Ty. Sec. 5478), upon the said Lot 6 in Block 5 and the said building thereon, but subordinate and inferior to the lien of the Plaintiff in error upon said lot, and superior to the lien of such plaintiff upon said building. (Tr. of Record, p. 30, folio 42, par. 9.) The court found as a *question of fact* that it would be for the best interests of all parties that said lot and the improvements thereon should be sold together—that the lot and improvements were of equal value, and that each is of the value of at least $2,500.00, (Tr. of Record, p. 28, folio 41), and directed judgment to be entered for the sale together of the lot and building and improvements thereon, and for the division of the money, one-half to the Plaintiff in error, and from the other half, that the plaintiffs' liens (Defendants in error) and cost be paid, if sufficient; and if not, then so far as may be. But if there is any excess, then the same be paid to the Plaintiff in error (Tr. of Record, p. 30, par. 11.) Thereupon, on the 10th day of May, 1899, judgment was entered, as directed. (Tr. of Record, p. 31, folio 45 and p. 43.) There is a stipulation and order amending the findings and judgment in a matter of detail. (Tr. of Record. p. 43, folio 63, and p. 44.)

Thereupon an appeal was taken by the Plaintiff in error from said judgment to the supreme court of North Dakota, (Tr. of Record, p. 44, folio 65), and the record certified to such court, (Tr. of Record, p. 46, folio 69, and p. 47), and errors assigned in said court challenging the conclusions of law made from the facts found in the district court. (Tr. of Record, p. 47, folio 70 and p. 48-49.)

The only error assigned that is deemed material at this time is as follows: "(a) In holding * * * * * * Second, That said part of Sec. 4795 of the Revised Codes of 1895, which authorizes a sale of the whole premises upon which a mechanics lien is filed and a division of the money arising from such sale, so as to give the prior mortgage, or other prior lien, priority on the lot, and the mechanics liens priority on the building or improvement is in violation of Section Ten of Article One of the Constitution of the United States, and Section Sixteen of Article One of the Constitution of North Dakota, as to mortgages given prior to its passage." (Tr. of Record, p. 48, folio 72.)

The supreme court of North Dakota affirmed the judgment of the district court of Cass County (Tr. of Record, p. 49, folio 72). The opinion of the supreme court of North Dakota is printed at length in the record at p. 50 to 54. A petition for re-hearing was presented to the supreme court of North Dakota and denied. (Tr. of Record, p. 55-56.) Thereupon the Plaintiff in error sued out a writ of of error and removed the record to this court. (Tr. of

Record, p. 57-64.)

There are four errors attempted to be assigned in this court, (Tr. of Record, p. 61), but it is not discovered that any question within the jurisdiction of this court is raised by any of such assignment, except the third, which reads as follows: "Third. In holding, adjudging and deciding that part of Section 4795 of the 1895 Revised Codes, of the State of North Dakota, viz.: "But if in the opinion of the court it would be for the best interests of all parties that the land and improvements thereon should be sold together, it should so order, and the court shall take an account and ascertain the separate values of the land, and of the erection, building or other improvements and distribute the proceeds of sale so as to secure to the prior mortgage, or other lien, priority upon the land, and to the mechanics lien priority upon the building, erection or other improvement", was in violation of Section Ten Article One of the Constitution of the United States, in so far as it is applied to the mortgage described in the first assignment of error and the title of the Red River Valley National Bank of Fargo acquired under a foreclosure of said mortgage." The first assignment of error referred to is found at the top of p. 61 of record.

II.

STATUTORY PROVISIONS.

The plaintiff in error seems to make but two points in its brief. The first is stated on p. 14, as follows: "We

contend that the remedy given by the statute to foreclose a mortgage by advertisement, under the power of sale, which includes the sale, the certificate and the deed, on the expiration of the period allowed for redemption, are all parts of the mortgage contract, and any law that interferes with, renders less valuable or divests the title acquired under a foreclosure by virtue of the statutory remedy impairs the obligation of the contract and is therefore void." The other point is found upon p. 17. It is not stated very clearly, but the affirmation and interrogatory show the contention. We shall print some parts of the statutes the defendants in error rely upon herein, notwithstanding the same may appear in the brief of Plaintiff in error.

The mortgage under which the plaintiff in error derives its title was dated July 8th, 1884, and filed for record July 19th, 1884. (Tr. of Record, p. 20, folio 29.) The Constitution of North Dakota did not come into operation until November 2nd, 1889.

The mechanics lien law of Dakota Territory in force prior to January 1st, 1896, so far as the same is relevant to any question within the jurisdiction of this court upon this record, is found in Ch. XXXI of the Code of Civil Procedure of Dakota Territory of 1877, Sec. 655, p. 586 of the Revised Codes of 1877. (See brief of Plaintiff in error, p. 20, Sec. 655.) Following such section are provisions in regard to sub-contractors upon works of internal improvement, not deemed material here. Sec. 662 is

material. (Brief of Plaintiff in error, p. 23, Sec. 662.)

The same provisions form Sec. 5469 and 5476 of the Comp. Laws, Dak. Ty., of 1887, except the matter contained in the proviso to Sec. 5469 has been added. Then follows a provision requiring the clerk of the district court, where the lien is filed, to make certain entries relating thereto. Sec. 663. (See brief of Plaintiff in error, p. 24, Sec. 663.) And Sec. 664, brief of Plaintiff in error, p. 24, relates also to priority of lien holders between themselves, and as against other incumbrances subsequently made. Then Sec. 665 defines to what property the lien extends, and is found on page 25 of brief of Plaintiff in error. The same provision is contained in Comp. Laws of 1887, Sec. 5479. And Sec. 666 reads: "The lien for the things aforesaid, or work, shall attach to the buildings, erections or improvements for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which the same is erected or put, and any person enforcing such lien may have such building, erection or other improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter." See same provision in Comp. Laws of 1887, Sec. 5480. The foregoing seem to be all the material provisions of the law relating to mechanics liens that were in force at the time the mortgage under which the Plaintiff in error deraigns title was executed or put of record.

There are a few other provisions of the statutes of

Dakota Territory and North Dakota that are material. They relate to the effect of a foreclosure of a mortgage by advertisement. The Plaintiff in error has not put them in its brief, but seems to assume or take it for granted that the statutory foreclosure of its mortgage wiped out all other liens. That is clearly an error. It was only a limited foreclosure. We quote the material provisions as follows. Sec. 614 of the Code of Civil Procedure, in the revision of 1877, p. 580, reads as follows: "(Effect of record and title.) A record of the affidavits aforesaid and the deed executed upon a sale of the real property shall vest in the purchaser or person acquiring title thereto by redemption, or otherwise, the same force and validity as the deed upon the foreclosure by action provided for in Sec. 623 of this Code." The same provision is contained in Sec. 5428 of the Comp. Laws of 1887, except that it refers to the different numbered sections in that revision. Sec. 623, referred to in Sec. 614 is as follows: "Whenever any real property shall be sold under an order, decree or judgment of foreclosure under the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale, as provided by Sec. 606 of this Code, and at the expiration of the time for redemption of such mortgaged premises, if the same be not redeemed, the person or officer making the sale, or his successor in office, or other officer appointed by the court, must make to the purchaser or purchasers, their heirs or assigns, or to any person acquiring the title of

such purchaser by redemption or otherwise, a deed or deeds to such premises which shall vest in the purchaser, or otner party entitled thereto, the *same estate* that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any time thereafter; and such deed shall be as valid as if executed by the *mortgagor* and *mortgagee* and shall be a complete bar against each of them, and against all the parties to the action in which the judgment for such sale was rendered and against their heirs respectively and all persons claiming under such heirs."

The foregoing are the provisions of the statutes relating to the force and effect of a statutory foreclosure in force in Dakota Territory and North Dakota, down to January 1st, 1896. They cover the whole period during which the plaintiff in error was taking steps to obtain the title it now asserts. The statutes were changed in the revision of 1895. Sec. 5856.

III.

ARGUMENT AND POINTS.

EFFECT OF STATUTORY FORECLOSURE.

Construing Sec. 623, abstractly, the word "estate" therein used refers to the kind or quantum of interest covered by the mortgage, but it is confined to title and not to mere liens. And the same is true of the clause, "or at any time thereafter". This clause refers to estate, and

nothing else; that is, such estate in the real property as the mortgagor had at the time the mortgage was given or has acquired at any time since. The point is clear from the language which follows: "Such deed shall be as valid as if executed by the mortgagor and mortgagee. So the sheriff's deed is equivalent to a deed executed by the mortgagor and mortgagee, but it seems to raise a question of time. However, it is in the present tense and can only refer to the date of the sheriff's deed. Clearly it cannot be construed to retroact to the prejudice of the lien holder. If it should be so held, then in connection with the prior sentence, it would cut off all prior sales and all subsequent liens—an absurdity. So its force is only that it conveys to the grantee, under the sheriff's deed, *the same estate* that a deed of like date, if executed by the mortgagor and mortgagee to him, would convey. It conveys the estate of the mortgagor and lien of the mortgage foreclosed, and nothing more. The expression of one thing is the exclusion of all others. The rule is applicable here. The language cannot affect any other interests in the property than the estate of the mortgagor and the lien of the mortgage—no other liens. And this contention is re-inforced by the fact that if the foreclosure is bad, the grantee in the sheriff's deed becomes the assignee of the mortgage lien of the mortgagee. In Packer v. R. & S. Co. 17 N. Y., 283, Mr. Justice Pratt, p. 298, says: "So far as the interest of the mortgagor is concerned, it is divested upon foreclosure by virtue of the power of sale contained in the

mortgage. Under that power, the purchaser, ofcourse, acquires title, *not as of the time of the execution of the instrument granting the power, but as of the time of the execution of the power.* He does not hold under the grantee of the power but directly from the grantor." Morevoer the Defendants in error never occupied the position of "redemptioners". See brief of Plaintiff in error, p. 46, Sec. 5421, Sub-div. 1 and 2. The right to redeem, it is believed is incident to every interest that is foreclosed. When a "redemptioner" comes to redeem he is required to pay only what the property sold for. It is a statutory right. In the case at bar the Defendants in error had not that right. But they might redeem under the general principles of equity, or be permitted to do so in an action for that purpose. In such case they would be required to pay the whole amount of prior liens irrespective of what the property sold for. Civil Code, 1877, Sec. 1715; Comp. Laws, Sec. 4339.

Spurgin v. Adamson, 18 N. W. Rep. 298; (Iowa).
Bunce v. West, et al., 17 N. W. Rep. 179 (Iowa);
Raynor v. Selmes, 52 N. Y., 579, p. 582;
Vroom v. Ditmas, 4 Paige Ch. 526, L. Ed. note;
Benedict v. Gilman, Id. 58. L. Ed. Note.
Gage v. Brewster, 31 N. Y. 218.

So much for the abstract proposition.

But the learned chief justice of North Dakota, in the opinion already rendered in this case, answers the concrete question against the contention of the Plaintiff in error.

It is not a federal question, but one strictly within the jurisdiction of the state courts, and the construction placed upon such provisions by the state courts must be followed by this court. In this very case, so far as necessary to its decision, the chief justice who wrote the opinion in the supreme court of North Dakota has given a construction to such statute. It is to the effect that it only forecloses the interest of the original mortgagor in the premises involved. He says: (Tr. of Record, p. 52, folio 77), "What were the rights of the mortgagee under the mortgage? Primarily to have the property covered by the mortgage, which was the naked lot, applied to the satisfaction of the debt secured by the mortgage. True, as to the mortgagor, the rights under the mortgage have ripened into title. His right of redemption has been foreclosed. But as to these lien holders whose rights in the building under the former law were superior to the rights of the mortgagee and which rights could not be affected by the foreclosure, the appellant must still rely solely upon its right under the mortgage." The same question upon the same Statute arose in the case of Laird-Norton Co. v. Herker, et al. 6 S. D. 509. 62 N. W. Rep. 104. See this point further considered infra.

IV.

THE LAW A PART OF THE CONTRACT.

It has been often affirmed by this court that the law in force at the time a contract is made enters into and

becomes a part of it. U. S. v. Quincy 4 Wall. 535; S. C. L. Ed. B. 18 p. 405-408. "These propositions may be considered consequent axioms in our jurisprudence. The laws which existed at the time and place of the making of a contract, and where it is to be enforced, enter into and form a part of it. This embraces alike those which affect its validity, construction, and discharge and enforcement." Mr. Justice Swayne, in Walker v. Whitehead, 16 Wall. 314; L. Ed. B. 21, p. 357, and in speaking of and enforcing like provisions in the mechanics' lien law of Iowa, this court says: "It entered into and became a part of their contract." Brooks v. B. & S. Ry. Co., et al., 101 U. S., 11 Otto, 443; L. Ed. B. 25, p. 1057-1060. The Defendants in error contend that it cannot be said that the enforcement of the law which entered into and formed a part of the contracts under which the Plaintiff in error claims in any way impairs the obligation of any such contracts. And we believe it has been universally so held by this court.

Lehigh Water Co. v. Easton, 121 U. S. 388; L. Ed. B. 30 p. 1059;
Denny v. Bennett, 128 U. S. 489; L. Ed. B. 32, p. 491;
Brown v. Smart, 145 U. S. 454; L. Ed. B. 36, p. 773.

V.

EFFECT OF THE LIEN LAW IN QUESTION.

The title of the Plaintiff in error to said Lot Six (6), Block Five (5), never extended to the building now thereon so as to exclude the mechanics' liens of the Defendants in

error. At common law ordinarily a building becomes a part of the realty. The same was true under the provisions of the Civil Code of Dakota Territory. See Civil Code, Sec. 163, et seq., Rev. Codes, 1877, Dak. Ty., p. 229-230. The common law rule, supra, or such rule as defined by statute, supra, may be changed or abrogated by, (1), the agreement of the parties, as by placing a chattel mortgage upon the building, or by selling the same separate from the land. Such act takes the building out of the common law or statutory rule. Certainly as between the mortgagor and mortgagee and persons claiming under them, or between the vendor and vendee and persons claiming under them. Myrick v. Bill, 3 Dak. Ty. Rep. 284, p. 288, and cases cited. Or, (2) by a statute, as where as in several of the states a mechanic or material man is given a lien upon the building separate from the land and in preference to all prior liens upon the land, and provision is made for enforcing the lien by sale and removal of the building or other erection. See 2 Jones on Liens, Sec. 1373, 2nd Ed. "A statute to this effect abrogates in favor of the lien the common law rule that things attached to the realty become a part of the realty, and that they cannot be afterwards severed without consent of the prior mortgees of the land." * * * * * * "The operation of the statute, in case there is a prior mortgage on the land, is to dissever the improvements from the realty by giving a superior lien on such improvements, and conferring on the purchaser the right to remove them." Id.

See also

Wimberly, Appellant, v. Maybury, et al. 94 Ala. 240; S. C. 10 South Rep. 157; S. C. 14 L. R. A. 305-309;
Turner v. Robbins, 78 Ala. 592;
Bedsole v. Peters, 79 Ala. 133;
Lane v. Jones, 79 Ala. 156;
Kansas City Hotel Co. v. Sauer, 65 Mo. 279.

The effect of such statutes is to give to the prior mortgagor a first lien on the lot or land and second lien on the building or other improvement subsequently erected, andto give to the mechanic's lien-holders a first lien on the building subsequently erected and a second lien on the lot or land. This very question was presented and decided in Newark Lime & Cement Co. v. Morrison, 13 N. J. Eq. 133. The chancellor says: "Upon the building itself it takes priority of any former encumbrance on the lands—upon the lands, it is subject to the lien of all prior encumbrances recorded or registered at the commencement of the building." p. 135. See also Fox v. Seal, 22 Wall, 424; L. Ed. B. 22, p. 774. Such is the position in which the assignor of the Plaintiff in error and the mechanic's lien-holders, the defendants in error, stood with reference to the property in question after their liens had been filed. The last lien was filed February 3rd, 1894. The sale of the property to the mortgagee, May 7th, 1894, under the statutory foreclosure did not change such relation. It could not divest the prior liens of mechanics and material-men upon the building. In the nature of things the foreclosure of a second lien cannot divest the holder of a first

lien of his right. The assignment of the sheriff's certificate by the purchaser at such foreclosure sale to the Plaintiff in error clearly conferred upon the latter no better or other right than the former possessed, and the same is true of the sheriff's deed. Sampeyreac v. U. S. 7 Pet. 222; L. Ed. B. 8, p. 665. So the title and interest of the Plaintiff in error to and in Lot Six (6), Block Five (5), was always and still is subject to the prior lien of the Defendants in error upon the building into which their labor and materials went, as an entire new structure.

The question and the very statute involved are discussed and construed as thus stated by the Supreme Court of South Dakota in Laird-Norton Co. v. Herker, et al. 6 S. D. 509, S. C. 62. N. W. Rep. 104. The court says: "The only effect of the foreclosure by advertisement and the execution of the sheriff's deed to appellant was to transfer to it the right and interest of the mortgagor and mortgagee, subject to the plaintiff's superior lien which remained in full force. Wilt. Mort. For. 814 and cases there cited. That a mechanic's lien, preferred and made paramount by statute, is not extinguisned and lost by the statutory foreclosure of an inferior incumbrance under a power of sale, is too clear to admit of argument or the citation of authority."

Howard v. R. R. Co. 101 U. S. 11 Otto, 837; L. Ed. B. 25, p. 1081.

VI.

REPEAL AND RE-ENACTMENT OF STATUTES.

It is contended that by the repeal of the statutes cited supra, when the Rev. Codes of North Dakota took effect, January 1st, 1896, the liens of the Defendants in error were thrown down and destroyed. There are two conclusive answers to such contention. (1) The rights of the Defendants in error under such liens were vested rights and could not be thrown down or destroyed by legislation; and, (2), the same provisions were re-enacted by the Rev. Codes, and so there was never in fact a repeal. Upon the first point the provisions of North Dakota Civil Code are apposite. Thereby it is provided, "There may be ownership of * * * * * * rights created or granted by statute." Comp. Laws, Sec. 2676. "In this Code the thing of which there may be ownership is called property." Comp. Laws, Sec. 2675. The foregoing provisions were in force in North Dakota at the time the liens involved in this action were earned and asserted (filed); but were repealed and re-enacted by the Rev. Codes of 1895. The liens of mechanics, etc., by Comp. Laws, Sec. 5469 are given to *secure* the payment, etc. Hathone v. Calef, 96 U. S. 2 Wall. 10; L. Ed. B. 17, p. 776. So such lien is clearly a *security*, and it has been denominated a statutory mortgage. We are again referred to the excerpt from Mr. Justice Swayne, supra. The contention then that the liens were destroyed by the so-called repeal of the statutes under which they were earned and asserted is answered by two distinct constitutional provisions, viz.: (a) The provision inhibiting the states from passing any

law impairing the obligation of contracts; and, (b) the inhibition against depriving one of property without due process of law.

See 2 Jones on Liens, Sec. 1558 2d Ed. and cases cited.
Suth. on Sty. Con. p. 626, Sec. 480;
Hoffman v. Walton, 36 Mo. 615;
Waters v. Mfg. Co., 32 S. E. Rep. 636 (Ga.);
Handel v. Elliott, 60 Tex. 145;
Strubel v. R. R. Co. 12 Wis. 67.

However, this is not a federal question but a question for the state court alone to determine, and it has been determined by the Supreme Court of North Dakota adversely to the contention of the Plaintiff in error, and in this very case. But upon the second point it is contended that there was in fact no repeal. The repeal of a law by a statute that re-enacts its provisions works no repeal, as there is no point of time when the provision is not in force. Such is the condition as regards the mechanic's lien law under which the liens in question accrued and were asserted. It was repealed by the Rev. Codes of 1895, but re-enacted therein, so they were continuous and are still the law.

Bear Lake & R. W. W. & I. Co. v. Garland, 164 U. S. 1; L. Ed. B. 41, p. 327.
Pacific Mail S. S. Co. v. Joliffe, 69 U. S. 2 Wall. 459; L. Ed. B. 17, p. 808.

A citation from the opinion of Taylor, J., in Sheftels v. Tobert, 46 Wis. p. 446, will be useful at this point. He says: "The rule of construction applicable to acts which revise and consolidate another act or acts is that when

the revised and consolidated act re-enacts in the same words the provisions of the act or act so revised or consolidated, such revision and consolidation shall be deemed to be a continuation of the former acts, although such former acts may be expressly repealed by such revised and consolidated act. * * * * * * Fullerton v. Spring, 3 Wis., 667; Hurley v. Town of Texas, 20 Wis., 634; Laude v. C. & N. W. Railway Co., 33 Wis., 640; and Glentz v. The State, 38 Wis. 549-554. * * * * This court has also decided that when a law which was originally enacted as one chapter is afterwards broken up and scattered through different chapters of a revision of the laws, the provisions of the different chapters in which the same is found must receive the same interpretation as when they constituted but one chapter. Buckstaffe v. Hanville, 14 Wis., 77; State v. Messmore, Id., 115; Smith v. Smith, 19 Wis., 522-3." Merkle v. Twp. of B., 35 N. W. Rep., 846, (Mich.); Moore v. Twp. of K., 75 Mich., 332; Alexander v. City of Big Rapids, 38 N. W. Rep., 227, (Mich.)

But compare the two lien laws:

Com. Laws, Sec. 5469:

Every . . . person who shall do any labor or furnish any material . . . for any building . . . by virtue of any contract with the owner, his . . . contractor or subcontractor, upon complying with the provisions of this chapter, shall have for his labor done or materials . . furnished, a lien upon such building . . etc., to secure the payment, etc., etc.

Rev. Codes, Sec. 4788:

Any person who shall perform any labor upon or furnish any material . . . for the *erecting* . . . of any building . . . under a contract with the owner *of such land,* his . . contractor or sub-contractor, shall, upon complying with the provisions of this chapter, have for his labor done and materials . . . furnished, a lien upon such building . . etc., to secure the payment, etc., etc.

The words found in Sec. 4788, Rev. Codes, and not in Sec. 5469, Comp. Laws, are clearly implied in the latter, so notwithstanding the fact that the provisions of the Revised Codes have enlarged upon the provisions of the Compiled Laws, yet to the extent that the latter reaches they are identically the same. In Suth. St. Con., Sec. 133, the rule is stated as follows: "The portions of the amended sections which are merely copied without change are not to be considered as repealed and again re-enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. The change takes effect prospectively according to the general rule." See cases cited by the author, Note 3.

And in Sec. 134. "Where there is an express repeal of an existing statute, and a re-enactment of it at the same time, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the enactment takes effect at the same time. * * * * Offices are not lost; corporate existence is not ended; inchoate statutory rights are not defeated; a statutory power is not taken away nor criminal charges affected by such repeal and re-enactment of the law on which they respectively depend." See cases cited in Notes 3 to 8 inclusive. There was no repeal.

VI.

THE CONSTITUTIONAL QUESTION.

It further remains to consider the matter specifically noticed in the Third error assigned. The provision of the Rev. Codes of 1895 therein quoted and of the application of which by the courts of North Dakota in this action complaint is made by the Plaintiff in error, is an amendment of Sec. 666 of the Code of 1877, and hereinbefore quoted, supra. Such amendment first went into effect on the 1st day of January, 1896, and in a sense as applied to the case at bar it is retroactive. The complaint is that the application of such provisions in this action violates Sec. 10, Art. 1 of the Constitution of the United States inhibiting the states from passing any law impairing the obligation of contracts. Clearly the contract obligation asserted to be impaired must be found in or arise from some one or all of the several contracts under which the Plaintiff in error acquired its interest in the real property in question, that is to say, in the mortgage given by Elvira Cooper to the Travelers Insurance Co. upon Lot Six (6), Block Five (5), original townsite of Fargo, and recorded July 19th, 1884; or, in the sheriff's certificate given to the purchaser, the Travelers Insurance Co., at the sale of said real property upon the statutory foreclosure of such mortgage; or, in the assignment of such certificate to the plaintiff in error; or, in the sheriff's deed executed to the Plaintiff in error after the time for redemption had expired; or in all of such instruments combined. Each and

all of the several contracts under which Plaintiff in error acquired its interest in the premises and constituting its muniments of title, were executed, delivered and accepted under statutes reserving the right to persons furnishing labor or materials for the erection of an entire new building, a lien upon such building as security for the payment, etc., in preference to the lien of a prior mortgage upon the land. The enforcement of a statute under and in reference to which a contract is made and into which contract the law entered and became a part of, cannot in any sense be said to impair its obligation. Prov. Inst. &C. v. Mayor &c. of Jersey City, 113 U. S. 506; L. Ed. B. 28, p. 1102. So therefore to the extent that the judgment complained of enforces a priority of lien upon the building in question in favor of the defendants in error, the contention of the Plaintiff in error is entirely without merit.

But in so far as the amendment to Sec. 666, supra, set forth in the Third error asigned provides that an account be taken and the separate value of the lot and the building to be found, etc., it is a change in the statute in force not only when the Plaintiff in error acquired its interest in the premises, but also when the Defendants in error acquired their liens thereupon. And as hereinbefore intimated, it is in a sense a retroactive law. However, for that reason alone it is premised it cannot be condemned or declared invalid. "That a statute is not void because it is retrospective has been repeatedly held by this court, * *. Nor does every statute which affects the value of a

contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contract previously made, * * * or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force."

Curtis v. Whitney, 13 Wall. 68; L. Ed. B 20, p. 513.

"Almost every law providing a new remedy, affects and operates upon causes of action existing at the time the law is passed.' * * * It forms no objection to the law that the cause of action existed antecedent to its passage, so far as it applies to the remedy and does not affect the right."

Sampeyreac v. U. S. 7 Pet. 222; L. Ed. B. 8, p. 665.

The position of the Plaintiff in error seems to resolve itself into the contention that the exercise in this case by the court of the authority conferred upon it by such amendment in some way impairs the obligation of the contracts under and by virtue of which the Plaintiff in error attempts to deraign its asserted exclusive title to the premises in question. All of the contracts constituting such Plaintiff's muniments of title have now passed to that stage known in law as executed contracts, except as later herein noticed. The obligation of such contracts is the law which binds

the parties to them to perform their agreement. Sturges v. Crowinshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213. But wherein is there an effort being made or action asked capable of being deemed or construed an impairment of the obligation of any or all of such contracts. It is submitted that there is no point of view from which such result can be discovered.

Again, the obligation of a contract is said to be: "The means provided by law by which it can be enforced —by which the parties can be obliged to perform it." And also: "Whatever legislation lessens the efficiency of these means impairs the obligation." Suth. on Sty. Con. p. 613, Sec. 471. "The laws which exist at the time and place of the making of a contract determine its validity, construction, discharge, and measure of efficiency for its enforcement."

Suth. on Sty. Con. p. 613, Sec. 471, citing
Green v. Biddle, 8 Wheat. 92; B. 5, p. 547;
Ogden v. Saunders, supra;
Bronson v. Kinzie, 1 How. 319; L. Ed. B. 11, p. 143;
McCracken v. Hayward, 2 Id. 612; L. Ed. B. 11, p. 397;
Walker v. Whitehead, 16 Wall. 314; L. Ed. B. 21, p. 357;
Van Hoffman v. Quincy, 4 Wall 535; L. Ed. B. 18, p. 403;
Edwards v. Kearzey, 96 U. S. 595; L. Ed. B. 24, p. 793;
Tenn. v. Sneed, Id. 69; L. Ed. B. 24, p. 610;
Mason v. Haile, 12 Wheat. 370; L. Ed. B. 6, p. 660;
Povident Inst. &c. v. Mayor &c. of Jersey City, 113 U. S. 506;
L. Ed. B. 28, p. 1102.

It is in no way disclosed by this record and cannot be discovered in what way the obligation of any contract which the Plaintiff in error is entitled to have enforced is impaired by the judgment complained of. Certain it is, that no obligation of any of the contracts by which the Plaintiff in error acquired and now holds its interest in premises in question is impaired, for the statute in question and the judgment rendered herein in pursuance of such statute fully recognizes the obligation of such contracts, and scrupulously protects the plaintiff in the exclusive enjoyment of its full interests in the property. "It neither took away any pre-existing right nor rendered less efficient any pre-existing remedies."

Louisiana v. New Orleans, 102 U. S. 203; L. Ed. B. 26, p. 132.

The claim of the Plaintiff in error stated according to its true sense and meaning is that it now complains because it is not allowed by the courts and the law of North Dakota to appropriate without compensation the labor and material expended upon the premises in question by the Defendants in error, or their assignors. No wonder the learned Chief Justice of the Supreme Court of North Dakota says, if such contention prevail, the Plaintiff in error will "enjoy the rare good fortune of having the value of its property doubled without any expense to itself." Tr. of Record, p. 51, f. 76.

We quote so much of the amended section as is pertinent. Words and letters dropped from the original section

are in parentheses; Rev. Codes, 1895, Sec. 4795. Words and letters added are in italics. "The liense for the things aforesaid, or *the* work, *including liens for additions, repairs and betterments* shall attach to the building(s), erection(s) or improvement(s) for which they were furnished or done in preference to any prior lien or incumbrance or mortgage upon the land upon which (the same) *such erection, building or improvement belongs or* is erected or put (and any person enforcing such lien may have). *If such material was furnished or labor performed in the erection or construction of an independent building, erection or other improvement commenced since the attaching of such prior lien, incumbrance or mortgage, the court may in its discretion order and direct* such building, erection or (other) improvement *to be separately* sold under execution and the purchaser may remove the same within (a) *such* reasonable time (thereafter) *as the court may fix. But if in the opinion of the court it would be for the best interests of all parties that the land and the improvements thereon should be sold together, it shall so order and the court shall take an account and ascertain the separate values of the land and of the erection, building or other improvement and distribute the proceeds of sale so as to secure to the prior mortgage or other lien priority upon the land and the mechanic's lien priority upon the building, erection or other improment."*

The changes effected by the foregoing amendments and complained of by the Plaintiff in error relate to the

remedy exclusively. They attempt neither to establish nor to destroy substantive or proprietory rights of either the holder of the mortgage lien or of the mechanic's lien-holders, but they do attempt to provide a better and more efficient remedy for the enforcement of rights otherwise created. However, they are retroactive in the sense that every statute relating to the remedy or procedure is retroactive when used to enforce rights existing before its passage.

Upon the principles already discussed the remedy existing at the accrual of a contract right cannot be challenged on the ground that it impairs the obligation of the contract. Van Hoffman v. Quincy, 4 Wall. 535; L. Ed. B. 18, p. 403. In practice the question arises upon the change in the law and the well established rule in regard to the change of the law of the remedy, or of the remedy, is, "without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." Marshall, C. J. in Sturgis v. Crowinshield, 4 Wheat. 122; L. Ed. B. 14, p. 529.

And all the decisions seem to hold to the same view.

Ogden v. Saunders, 12 Wheat. 213; L. Ed. B. 6, p. 606;
Beers v. Haughton, 9 Pet. 329; L. Ed. B 9, p. 145;
Tenn. v. Sneed, 96 U. S. 69; L. Ed. B. 24, p. 610.
Cooley's Con. Lim. 6th Ed. p. 347, et seq., and cases cited;
Curtis v. Whitney, 13 Wall. 68; L. Ed. B. 20, p. 513;

Ewell v. Daggs, 108 U. S. 143; L. Ed. B. 27, p. 682;
U. S. v. Quincy, 4 Wall. 535; L. Ed. B. 18, p. 403-409;
Suth. Sty. Con., p. 619, sec. 476-478 and cases cited;
Walker v. Whitehead, 16 Wall. 314; L. Ed. B. 21, p. 357;
Louisiana v. New Orleans, 102 U. S. 203; L. Ed. B. 26, p. 132;
Bronson v. Kinzie, 1 How. 311; L. Ed. B. 11, p. 143;
Mason v. Haile, 12 Wheat. 370; L. Ed. B. 6, p. 660;
White v. Hart, 13 Wall. 646; L. Ed. B. 20, p. 685.

In Tenn. v. Sneed, (96 U. S. 69; L. Ed. B. 24, p. 610), the principle is stated thus: "The rule seems to be that in modes of procedure and of forms to enforce the contract the legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so embarass it with conditions or restrictions as seriously to impair the value of the right. Bronson v. Kinzie, supra." We add illustrations from some of the numerous decisions of the state courts and text writers upon the subject. "Where a new statute deals with procedure only, prima facie it applies to all actions—those which have accrued or are pending and future actions." Suth. Sty. Con., Sec. 482, p. 630 and cases cited. Rev. Codes, 1895, Sec. 5148; also Sec. 5142. "Laws giving more efficacious remedies or improving existing ones, or adding new ones, or removing disabilities or penalties, do not impair the obligations of contracts." John Norton Pome-

roy's note to Sedg. on Con. of Sty. and Con. Law, p. 617, 2d Ed., and cases cited.

The amendment under consideration even when considered in view of the principles laid down in the case of James River Lumber Co. v. Danner, 3 N. D. 470, much relied upon by the Plaintiff in error (Tr. of Record, p. 55), is not open to the charge of impairing the obligation of contracts. The case sought to enforce a lien on the building for restoring the roof destroyed by fire. The court says: "The remedy of sale and removal of the building is not given to enforce the lien generally, but merely to make efficacious the priority of the lien, as against an existing mortgage on the land. The owner who furnishes material has clearly a lien on the whole property, land and all—subsequent to the lien of the mortgage. This lien he enforces in the ordinary way. But this part priority of lien which the statute vests in him is enforced in the statutory manner, and in that manner alone. The priority of lien is upon the whole building. To enforce it, there has to be a sale of the whole building and the purchaser may remove the whole building. Where this cannot be lawfully done, as against the mortgagee, the priority of lien does not exist." The Plaintiff in error seems to invoke such decision as a rule of property. But, clearly it is not such to it. However if it be so considered, it canont aid the Plaintiff in error, as it cannot be extended or expanded beyond the facts on which it is based. The case at bar is not within the facts or the rule deduced

therefrom. Nor does the contention raise any federal question. That decision is not the law of this case. Nor is it capable of being invoked as an estoppel by judgment or otherwise. It lacks all of the four "identities." 2 Black, Judgments, 610. See Stryker v. Crane, 123 U. S.; L. Ed. B. 31, p. 194. But no question within the jurisdiction of this court upon this record can be raised on the construction placed upon the state statutes that entered into the contracts in question by the state courts. The decision of the state court is not a law within the meaning of Sec. 10, Art. 1, United States Constitution. So the state courts in one action, at one time may rule the question one way, and thereafter, in another action overrule their former decision and rule the question another way, and it raises no question for this court under the constitutional provision named. The doctrine of stare decisis in no way presents a federal question.

The amendment to the statute now under consideration, if such decision was ever entitled to be given the force urged by the Plaintiff in error, is more in the nature of a validating act and not open to the claim made. "Laws validating contracts are not objectionable as impairing the obligation. Sparks v. Claffer, 30 Ind. 204; Welsh v. Wadsworth, 30 Conn. 149; Thornton v. McGrath, 1 Duv. (Ky.) 349."

Sedg. on Con. of Sty. and Con. Law, p. 617, note;
Randall v. Krieger, 23 Wall. 137; L. Ed. B. 23, p. 124;

Livingston v. Moore, 7 Pet. 569, p. 550; L. Ed. B. 8, p. 751-780;
Wilkinson v. Leland, 2 Pet. 627; L. Ed. B. 7, p. 542;
Kearney v. Taylor, 15 How. 494; L. Ed. B. 14, p. 787.

"To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity can be regarded as of that character. Consent to remedy the wrong is to be presumed. * * * * * * Even where no remedy could be had in the courts the vested right is usually unattended with the slightest equity. Cooley Con. Lim. 378."

Mr. Justice Swayne in Randall v. Krieger, 25 Wall. 137; L. Ed. B. 23, p. 124.

Perhaps the amendment in question was made to avoid the embarrassment suggested in the opinion of the case of James River Lumber Co. v. Danner, supra. "A very large proportion of the legislation in all the states is prompted by the decisions of the courts, and is intended to remedy some mischief pointed out by or resulting from the utterances of the courts of the country." New Orleans v. New Orleans Water Co., 142 U. S. 79; L. Ed. B. 35, p. 943; Morley v. L. S. & M. S. R. Co., 146 U. S. 162; L. Ed. B. 36, p. 925.

This question was pressed upon the attention of the Supreme Court of North Dakota in this case, and that court held against it. In Brown v. Smart, (45 U. S. 451;

L. Ed. B. 36, p. 773, this court says: "The position taken by him (plaintiff in error) in the court below * * * * * * * * that the obligation of the contract with him has been unconstitutionally impaired, is clearly untenable because the statute of the state was in existence when the contract was made, and the subsequent decision of the court of appeals was not a law, within the meaning of the Constitution which declares that no state shall pass any law impairing the obligations of contracts." New Orleans Water Works Co. v. La. Sugar Refining Co., 125 U. S. 18; L. Ed. B. 31, p. 607; Cent. Land Co. v. Laidley, 159 U. S. 103-112; L. Ed. B. 40, p. 91. The decision in the case at bar involved the construction only of a state statute, in which this court must defer to the Supreme Court of North Dakota. In Lehigh Water Co. v. Easton, (121 U. S. 388; L. Ed. B. 30, p. 1059-1060), the question was whether an act of the legislature of Pa., passed in 1867 was repealed by a subsuquent act of 1874. The court says: "That is a question simply of statutory construction, which the state court was competent to determine, and whose judgment in reference thereto is not subject to re-examination in this court." The state court is the proper tribual to construe and determine the validity of the enactments of their own legislature.

Florentine v. Barton, 2 Wall. 210; L. Ed. B. 17, p. 783;
Freeborn v. Smith, 2 Wall. 160; L. Ed. B. 17, p. 922.

"A remedy may be provided for existing rights and new remedies added to or substituted for those which exist." Suth. Sec. 842, p. 330, and case cited. Com. v. Hall, 97 Mass. 570. (A decision upholding legislation taking away objection to variance in an indictment.)

"Where a right already existed it is in the power of the legislature to devise and provide a remedy." Suth. et al. v. DeLeon, 1 Tex. 250; P. O. C. R. R. Co. v. Gt. R. R., 46 Me. 69. (Legislation providing a remedy to effect the crossing of railroads.) Whipple v. Farrar, 3 Mich. 436, p. 445. (Legislation providing a remedy where none existed before.)

Reapers Bank v. Willard, 24 Ill. 433. (Legislation providing for enforcing obligation against the bank.) Sanders v. County, 44 N. H., 233. (Legislation changing county wherein insurance company may be sued.)

L. and O. R. Co. v. Ballard, 2 Met. (Ky.) 165. Legislation subjecting road, right of way, franchises and all property, real and personal, to a sale by chancellor to pay debts, etc.)

Union Co. v. Gilfillan, 93 Pa. St. 95; Granahan v. H. St. & St. Jos. R. R. Co., 30 Mo. 546. (Legislation providing action for labor for sub-contractor.)

Peters v. The St. L. & I. M. R. R. Co., 23 Mo. 107. (Legislation relating to laborers' liens.)

Lang's Appeal, 87 Pa. St., 114. (Legislation providing for assessment of damages in eminent domain.)

Templeton v. Horn, 82 Ill. 491. (Legislation allow-

ing redemption from sale of mechanic's lien.)

Holland v. Dickinson, 41 Iowa, 367; Penrose v. Erie Co. 56 Pa. St. 46. (Legislation providing a change in the remedy.)

Woodruff v. Scruggs, 27 Ark. 26; Rader v. Road District, 26 N. J. Law, 273; Lycoming v. Union County, 15 Pa. St. 161, and cases cited. Legislation providing remedy to enforce moral obligation theretofore existing.)

Sedg. Co. v. Bunker, 16 Kas. 190.
Wimberley, Appellant, v. Maybury et al., 94 Ala. 240; 10 South Rep. 157; 14 L. R. A., 305—309.

The fact that the building wholly erected may be sold and removed pertains to the remedy only. So the amendment complained of; and it in no way enlarges or diminishes the force and extent of the rights of the Plaintiff in error or the liens of the Defendants in error as declared by the statutes in force when they originated.

Hepburn v. Curtis, 7 Watts, 300, 32 Am. Dec. 760. Held that laws may be passed affecting, "suits pending and give to the party a remedy which he did not previously possess or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings." McLimans v. Lancaster, 73 Wis. 596; 23 N. W. Rep. 689. (Legislation authorizing a married woman to bring suit alone for injury to herself, held to apply to a pending action.)

Boston v. Cummings, 16 Ga. 102, held that an act

requiring deeds to be recorded within a limited time applied to deeds executed before its passage.

Wilbur v. Gilmore, 21 Pick. 250, (Mass.). Held, an act allowing an action by an executor for injury in the life time of the testator was not unconstitutional, even when applied to a trespass committed before the act went into operation. The court says: "The presumption against retrospective construction has no application to enactments which affect the procedure and practice of the courts, even where the alteration which the statutes make has been disadvantageous to one of the parties * * * * * * * * *. A law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions. No person has a vested right in any course of procedure, nor in the power of delaying justice, nor of deriving benefit from technical and formal matters of pleading. He has only the right of prosecution or defense in the manner described, for the time being, by or under the court in which he sues; and if the statute alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort. Takes away no vested right, for the defaulter can have no vested right in the state of the law which left the injured party without or with only a defective remedy." 6 Am. & Eng. Enc. of Law., 2d Ed. p. 946, et seq., and notes.

JudgeCooley's Con. Lim. p. 454, lays down this rule thus: "A party has no vested right in a defense based

upon an informality not affecting his substantial equities." See also New Orleans v. Clark, 95 U. S. 644; L. Ed. B. 24, p. 521. "The best general rule laid down showing the validity of such statutes is given in 1 Kent, Com. 456, where it is stated that statutes which go to confirm existing rights, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations, are clearly valid. See notes to Goshen v. Stonington (Conn.) 10 Am. Dec., beginning on p. 131, an extensive note on this subject and vested rights.

See also people ex rel. v. Spicer, 99 N. Y. 225, p. 233; Paine v. Woodworth, 15 Wis. 298; Rich v. Flanders, 39 N. H., 304; Sargent, Justice, in construing an act making persons competent as witnesses who were not so before, held, it applied to pending suit, and quotes and adopts the language of Mr. Webster in his argument in the case of Foster v. Essex Bank, 16 Mass. 245; 8 Am. Dec. 135; "A distinction must be made between acts which affect existing rights, or impose new obligations and acts which give new remedies for existing rights, and enforce the obligation of previous obligations." Wade on Retroactive Laws, Secs. 23 and 24. Cullahan v. Sweeney, 79 Cal. 537. It follows that even though the liens in question were not available under the Comp. Laws for want of an ample remedy, it was competent for the legislature to provide a remedy in the Revised Codes, and it is so did by the amendment to Sec. 4795.

VIII.

THE CONSTITUTIONAL QUESTION CONTINUED.

It further remains to inquire as to whether the court may enforce the lien by sale of the whole premises and a division of the money without encountering the inhibition of the Constitution. The Defendants in error pleaded matter (Tr. of Record, p. 10, par. 21) showing the necessity for such order, and so did the Plaintiff in error (Tr. of Record, p. 14, f. 20). We have shown that the title of the Plaintiff in error was acquired under a mortgage that was subject to the right of mechanics, etc., and a lien upon the new building erected, etc., and subject to the right to have such building sold and removed to satisfy such lien. However, the legislative assembly anticipated that such cases might arise, or that cases it may be had already arisen where both, or at least one of the parties, would be injured in some particular by such provision being enforced, and so it provided: "But if *in the opinion of the court, it would be for the best interests of all the parties* that the lands and improvements should be sold, etc. It is when the interests of all the parties would be advanced—not impaired—that the court is authorized to order the sale, and so the statute itself excludes every objection that can be raised against it by the Plaintiff in error. The court must determine judicially that it would be for the best interests of all the parties before the sale can be ordered and the court has so determined in the case at bar. (Tr. of Record, p. 28,

par. 14.) The question of "best interest" is purely one of fact and cannot be inquired of by this court. Again the remedy of the old Code is not available to the Defendants in error except to the extent that it is preserved in the new. So all rights must be enforced in accordance with the law now in force. "All rights of parties under mechanic's lien laws are to be ascertained and fixed by the law in force when the contract was made; but such rights are to be established and enforced by the law existing at the bringing of the suit." Philipps on Mch. Liens, Sec. 24, citing Willamette v. Riley, 1 Ore. 183. "The remedy which the law supplies for the enforcement of several obligations may attach to those already in existence, as well as those of the future. * * * * So existing rights may be enforced by additional remedies provided subsequent to the acquisition of such rights." Wade Retroactive Laws, Sec. 221, and cases cited. See also Sec. 222 for cases in which the foregoing principles have been applied and cases cited.

The judgment in question properly provided for the sale of the entire premises, and it violates no constitutional principle. The question here presented is not unlike that in an action for partition, where part of the co-owners object to a sale of the premises for the purpose of effecting a division. The exercise of such power violates no constitutional principles. 17 Am. and Eng. Enc. of Law, 785 et seq., and notes. And the entire property may be sold when there are several liens, and the money dis-

tributed according to the priorities of the several creditors. 13 Enc. Pl. & Pr. 1042, et seq., and notes.

Finlayson, et al., v. Crooks, 49 N. W. Rep. 398 (Minn.);
Kennedy v. Apgar, et al., 93 N. Y. 539;
Philipps, Mech. Liens, Sec. 238—239, and cases cited;
Wimberley, Appellant, v. Maybury, et al., supra;
Crosky, et al., v. N. W. M. Co., 48 Ill. 481;
Crundies v. Hartwell, 90 Ill. 324;
Bradley v. Simpson, 93 Ill. 93.

In Richardson, et al., v. Monson, et al., 23 Conn. 94, the court, in speaking of enforcing a statute authorizing an order of sale to effect a partition of real property acquired before the passage of such act, the constitutionality of the act being vigorously challenged, says: "It is purely a remedial law acting upon existing rights and providing a remedy for existing evils; disturbing no titles * * * * * * the object of the statute in question is only to provide a reasonable remedy for joint owners of real estate and has no reference to contracts, even remotely. Many laws affect contracts incidentally, and are not, for such cause, to be treated as unconstitutional." And in Newark Lime and Cement Co. v. Morrison, 13 N. J. Eq. 133, in enforcing a statute giving to mechanics, etc., liens upon the building as against the prior mortgage upon the land the chancellor says: "But it cannot be affirmed that the mortgagee has any vested right in any building or improvement not erected at the date of the mortgage, or

that a lien which gives to the party whose labor is employed or materials expended in the erection of such building, infringes upon any vested right of the mortgagee or infringes any constitutional provision. The wisdom or policy of such enactment is a matter exclusively for legislative consideration." p. 135.

The rights of parties are not divested by changing the form of the property from real property to money. Wade Retroactive Laws, Sec. 241, citing Norris v. Clymer, 2 Pa. St., 277, p. 284; Sargent v. Kulen, 2 Pa. St., 393. In speaking of a similar question in Lobrano v. Nelligan, 9 Wall. 295; L. Ed. B. 19, p. 694, this court says: "The principle which allows a change of security necessarily leaves the legislative power over the whole subject unabridged, and there is no right of complaint, if the legislature, in varying the nature and extent of the security, takes care that the property is preserved." See also Williamson v. Berry, 8 How. 495; L. Ed. B. 12, p. 1170. Ogden v. Sauders12 Wheat. 266; L. Ed. B. 6, p. 606; R. R. Co. v. Nesbit, 10 How. 395; L. Ed. B. 13, p. 469. Carpenter, et al., v. Penna. 17 How. 456; L. Ed. B. 15, p. 127. In this case the court says: "This court has no authority to revise the act of Penna. upon the grounds of interest, policy or consistency to its own constitution. These are concluded by the decision of the public authorities of the state. The only inquiry for this court is, does the act violate the Constitution of the United States or the treaties and laws made under it.

Lock v. New Orleans, 4 Wall. 172; L. Ed. B. 18, p. 334;
Drehman v. Stifle, 8 Wall. 595; L. Ed. B 19, p. 508.

IX.

LIMITED EFFECT OF STATUTORY FORECLOSURE.

In the foregoing parts of this brief we have gone quite extensively into questions more or less bearing upon the points under discussion. Perhaps we have so done more fully than necessary to a consideration of the narrow question within the jurisdiction of this court upon this record. However that may be we believe the argument greatly elucidates the contention of the Defendants in error. There remains but one point more to consider i. e., what was the interest or right of the Plaintiff in error in the property in question—lot or building, or both—after the statutory foreclosure and the execution of the sheriff's deed as between it and the lien-holders, the Defendants in error. A further reference to the statutes of Dakota Territory and of North Dakota in regard to the effect of a foreclosure of a mortgage under a power contained therein becomes necessary. Code Civil Procedure, Dak. Ty., 1877, p. 580, Sec. 614 and 623; Comp. Laws, Dak. Ty., 1887, Sec. 5428 and 5437. At this point it should be observed that the burden is on the Plaintiff in error affirmatively to maintain its contention. The mortgage nowhere appears in the record, nor does any of its

provisions. Nothing appears in the record justifying the alleged foreclosure by the Travelers Insurance Company of the mortgage in question other than the allegation of the Plaintiff in error in its answer (Tr. of Record, p. 13, f. 19) to the effect that a sale was made "by virtue of the power of sale in said mortgage contained", and the court finds (Tr. of Record, p. 21, par. 2) as a fact that said premises were sold under proceedings duly had by advertisement, etc. So the question of fact is concluded by such finding. The learned Chief Justice of North Dakota, in the opinion in this action (Tr. of Record, p. 52, f. 77), responding to the contention of the Plaintiff in error that its rights had been unlawfully invaded by the judgment, construing the statutes, supra, and defining the effect of the statutory foreclosure in question, says: "True as to the mortgagor, the rights under the mortgage have ripened into title; his right of redemption has been foreclosed, but as to these lien-holders, whose rights in the building under the former law were superior to the rights of the mortgagee, and which rights could not be affected by the foreclosure, the appellant (Plaintiff in error) must still rely solely upon its right under the mortgage." The record no doubt assumes the validity of the statutory foreclosure, for some purposes, and even as against the defendant, Rosa Herzman, (not against the Defendants in error) but she is making no point, and Elvira Cooper and her husband were the mortgagors. There were, therefore, two points upon which the decision of the Supreme Court of North

Dakota was based: (1), that the mortgage under which the Plaintiff in error claims title, as against the interests of the Defendants in error, had never been foreclosed; and, (2), that the amendment to the Code of North Dakota authorizing a sale of the entire property—lot and building—and a division of the moneys according to the rights and equities of the respective parties, as applied to the facts disclosed in the record does not violate Sec. 10, Art. 1 of the Constitution of the United States. The first does not raise any federal question. It is based upon a construction of statutes in force when the mortgage was given and when the liens were filed. The fallacy of the contention of the Plaintiff in error, (though not well taken in other regards as we have shown), clearly rests in the effect attempted to be given to the foreclosure by advertisement of the mortgage under which it deraigns title. And that is a question exclusively within the jurisdiction of the state courts. The state court has in this action determined that such foreclosure did not affect the liens of the Defendants in error, so the lien—mortgage to Travelers Insurance Company,—held by the Plaintiff in error and the mechanics liens held by the Defendants in error had not been foreclosed when this action was commenced, and the judgment complained of only effected a foreclosure of the several liens and settled the preference of the several parties under such liens. And besides it upholds the obligation of every contract of every party, and in strict conformity to the rights established thereby under

the law in view of which they were brought into being. It is therefore clearly established that there is no federal question involved in this record. The judgment complained of then amounts only to a marshalling of assets by foreclosure and a sale of the property covered by liens (conflicting liens it may be) for the benefit of the lien-holders and to be distributed among them according to their respective rights and equities. See 13 Enc. of Pl. & Pr., p. 1042—11 and notes; Bernhardt v. Lymburner, 85 N. Y., 172; Kennedy v. Apgar. et al., 92 N. Y. 539; Finlayson et al., v. Crooks, 47 Minn. 74. The general equity powers of the court, without the amendment of 1895 complained of, (Tr. of Record. p. 61, Third) were sufficient to justify such judgment. And such is true even in view of the rule announced by the Supreme Court of North Dakota in James River Lumber Co. v. Danner, supra. But in the opinion in the case at bar the court adheres to the rule announced in the Danner case. It says, that when the building is so situated that it can be removed only by demolition, the court will not sanction its removal *where it would impair the right of the former mortgagee.* (Tr. of Record, p. 51, f. 76). The facts of the two cases are not the same. In the former the lien was for repairs,—restoration of a roof destroyed by fire—of a building covered by a prior mortgage. To remove the building would invade the rights of the mortgagee. In the case at bar, the lien is for the construction of an entire new building and the law appropriates the entire building to

the payment of the mechanic's lien-holders. Their lien is their security, before and in preferance to all other liens. A removal of the building by demolition would not invade the rights of the prior mortgagee—the Plaintiff in error. The contention of the Plaintiff in error is not apposite. Were the facts in the case at bar identical with the facts in the Danner case, and the court should apply the last paragraph found in Sec. 4795 of the Rev. Codes of 1895, which is an amendment of a prior statute and relates to liens for materials furnished or labor performed upon additions to, repairs of, or betterments upon buildings already constructed and covered by mortgage, then the principles urged by the Plaintiff in error might be apposite. But as the case is they are not. See Sec. 4795, Rev. Codes of 1895. The method established by law for the foreclosure of mortgages—a mortgage is only a lien—and liens upon real property, both in Dakota Territory and in North Dakota is by the sale of the property covered thereby. Code Civil Procedure. Dak. Ty., 1877, Sec. 617; Comp. Laws, Sec. 5431; Rev. Codes, 1895, Sec. 5866. And the same is true when a foreclosure is had by advertisement under a power. But a statutory foreclosure under a power contained in the mortgage was, prior to the Rev. Codes of 1895, only a limited foreclosure —it affected the interests of no one in the property except that of the mortgagor and mortgagee—those having subsequent liens upon or interests in the property—conventional or statutory—were not foreclosed. The purchaser under

the statutory foreclosure became an assignee of the mortgage as to all subsequent lien-holders and must seek relief by action in order to bar their interests. See opinion of Suprme Court of North Dakota in this action. (Tr. of Record pp. 50-54.)

Laird-Norton Co. v. Herker, et al., 62 N. W. Rep. 104 (S. D.);
Code Civil Procedure, Dak. Ty. 1877, Sec. 614;
Comp. Laws, 1887, Sec. 5428;
Benedict v. Gilman, 4 Paige Ch., 58; L. Ed. B. 3, p. 340; and notes and cases cited therein;
Vroom v. Ditmas, 4 Paige, Ch. 526; L. Ed. B. 3, p. 545 and notes and cases cited therein.

The foreclosure of the mortgage under which the Plaintiff in error claims by the Travelers Insurance Company by advertisement was in its effect nothing other or different than a foreclosure by action in which the mortgagee was plaintiff and the mortgagor was defendant and the interests of no other persons were affected thereby. It is so held by the Supreme Court of North Dakota in this very action, supra, and also by the Supreme Court of South Dakota in Laird-Norton Co. v. Herker, supra, and that question is not open to decision or consideration in this court upon this record.

X.

NO FEDERAL QUESTION.

In Brown v. Atwell, 92 U. S. 327; L. Ed. B. 23, p.

511, this court says, citing numerous authorities: "We have often decided that it is not enough to give us jurisdiction over the judgment of the state court for the record to show that a federal question was argued or presented to that court for decision. *It must appear that its decision was necessary to the determination of the cause and that it actually was decided,* or that the judgment as rendered could not have been given without deciding it." See also State, ex rel. v. The Board, etc. 98 U. S. 8 Otto, 140-142; L. Ed. B. 25, p. 114, and cases cited. In the case at bar the opinion of the state court shows that it actually decided a federal question, but it is submitted that such question was not necessary to a determination of the case. It must have been decided in the same way on other grounds and grounds which were actually considered. So it follows that this court is without jurisdiction to review the judgment complained of. Bacon, et al., v. State of Texas, 163 U. S. 207; L. Ed. B. 41, p. 132. But if this contention is not sustained, then it is insisted that the federal question was correctly decided by the Supreme Court of North Dakota, and its decision should be affirmed.

XI.

CONCLUSION.

The errors we have attempted to discuss are those assigned by the Plaintiff in error in suing out its writ of error to the Supreme Court of North Dakota. (Tr. of Record, p. 61). The first is quite confused; it does not

seem to refer to the mortgage under which the Plaintiff in error deraigns its alleged title to Lot Six, Block Five in question. However that may be we urge that it only suggests errors committed by the state courts in construing the statutes in force at the time the Travelers Insurance Company took the mortgage under which the Plaintiff in error claims. Such contention raises no federal question.

New Orleans Water Works Co. v. La. Sugar Ref. Co., 125 U. S. 18;
L. Ed. B. 31, p. 607;
Lehigh Water Co. v. Easton, 121 U. S. 388;
L. Ed. B. 30, p. 1059—1060;
Cent. Land Co. v. Laidley, 159 U. S. 103—112;
L. Ed. B. 40, p. 91.

The second is of no greater force and is open to the objection that the decision complained of only determines the rights and equities of the parties as between themselves, upon general principles of equity in view of the statutes and contracts under which their interests were acquired. That the Plaintiff in error is given thirty days time in which to pay the claims of the Defendants in error is only an act of descretionary grace extended by the court for the benefit of the Plaintiff in error—for its advantage. It cannot complain of such action. This assignment of error is equally wanting in force to raise any federal question. See authorities cited, supra. The third error assigned we have fully discussed. The fourth error assigned only challenges the judgment upon principles of general jurisprudence. Such judgment is not open to review in this court upon

this record on any such challenge. Such questions were exclusively within the jurisdiction of the state courts. Even though the judgment, "by the law of the land" ought to have been given in favor of the Plaintiff in error and against the Defendants in error, as asserted, it is clearly not within the jurisdiction of this court upon this record so to determine. Such assignment of error raises no federal question. See authorities cited, supra. The contention of want of due process of law is so clearly not tenable that we do not discuss it. We realize that we have discussed some questions not made in the brief of the Plaintiff in error. But they are questions that are raised upon the record, and the Plaintiff in error thereby would seem to have the benefit of them, so we discuss them. This course seemed quite necessary in view of the fact that it is expected that the interests of the Defndants in error will be submitted to the court without oral argument and upon this printed brief.

Respectfully submitted,

SAMUEL B. PINNEY,
Attorneys for Defendants in error.
Fargo, N. D.

Geo. W. Newton, Emerson H. Smith,
John D. Benton, V. R. Lovell and
C. L. Bradley,
of Counsel, Fargo, N. D.